OPINION NUMBER 95-1

DATE: January 12, 1995

SUBJECT: Release of City Employee Names

REQUESTED BY: Rich Snapper, Personnel Director

PREPARED BY: Sharon A. Marshall, Deputy City Attorney

QUESTION PRESENTED

May the names of City employees currently under investigation by the City be released to the public?

SHORT ANSWER

Based upon the information currently available, it is our advice that the names of the employees should not be disclosed at this time.

CONCLUSION

The United States and California Constitutions grant broad protections to an individual's right to privacy. Conversely, the Public Records Act, with narrow exceptions, allows the public extensive access to records which reflect and explain the operation of its government. The two competing fundamental interests protected by these bodies of law must be balanced when issues regarding disclosure of personal information are raised.

Thus, although City employees are subject to public scrutiny under certain conditions prescribed by law, they have a strong interest in maintaining confidentiality in their personnel records so that the due process rights afforded them by law are protected. At the present time, no compelling public policy reason for disclosure of the names has been put forth and we may not assume appropriate reasons. Absent additional information, the request serves no apparent purpose and we believe it to be in the best interests of the City that the request be denied at this time.

BACKGROUND

On November 7, 1994, Channel 10 news aired a segment which allegedly showed City employees conducting themselves inappropriately during City-paid work hours. Subsequent to the airing of the tape, at the December meeting of the Civil Service Commission ("Commission") a Civil Service Commissioner requested the names of the individuals shown on the news program. The City Attorney advised the Commissioner that department investigations into the issues raised by the tape were ongoing and, as a result of the ongoing investigations, release of the

names to the Commissioner at that time would be inappropriate. The Commissioner then requested that the Commission conduct an investigation pursuant to San Diego City Charter ("Charter") section 128. The Commission declined to order an investigation because of the investigations already in process.

The Commissioner then provided a letter to the Commission from a City resident. The letter requested that the Commission conduct an investigation into the matter, again pursuant to Charter section 128. Although this request was denied by the Commission as untimely, the request will be addressed at the February, 1995, Commission meeting after proper notice.

In a subsequent letter to the City Attorney and Personnel Director, the Commissioner now requests a written legal opinion as to whether the names may be released. The letter indicates that the Commissioner does not seek information concerning the nature or results of any ongoing investigations. He seeks only the names of the individuals.

ANALYSIS

Two main legal principles control the Commissioner's request for information. The first is the right to privacy found in both the United States and California Constitutions. The second is the California Public Records Act ("the Act"), Government Code sections 6250-6255.

The right to privacy protects individuals from unnecessary intrusions into their lives, particularly when the intruders are a governmental agency. The Act safeguards the right of the public to have access to records which define and describe how its government operates. The very nature of the two bodies of law mandates that there will sometimes be conflict between the rights of the individual and the rights of the whole. For this reason, a balancing test is provided for in the Act to reach resolution when conflicts, such as the one presented, occur.

Right to Privacy

The right to privacy in the United States Constitution is not a specifically enumerated right. Rather, it has developed over the years through judicial interpretation by application of specific facts to the law. California courts have adhered to the principles set forth by the United States Supreme Court. Additionally, the California courts have cited with approval Supreme Court cases which indicate that an analysis of the right to privacy must begin with the recognition that:

> "[T]he Constitution's protection is not limited to direct interference with fundamental rights." "In the domain of these indispensable liberties, whether of speech, press, or association, [p]rivacy the decisions of this Court recognize that abridgement of such rights, even though

> unintended, may inevitably follow from varied forms of governmental action." As the United States Supreme Court stated recently in Healy v. James, supra, 408 U.S. 169, 183 ┌33 L.Ed.2d 266, 280-281σ: "We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: 'Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference.'"

White v. Davis, 13 Cal. 3d 757, 767 (1975) (citations omitted).

In weighing the individual right to privacy using the court's standard, we must look not only to the obvious effects disclosure might give rise to, but those more subtle impacts that disclosure may have on the rights of the individuals involved.

In contrast to the federal right to privacy, the California right to privacy was specifically added to the constitution by a vote of the electorate in 1972. Moreover, this right is specifically directed at government intrusions into the lives of individuals for improper purposes. "The right of privacy is the right to be left alone. It is a fundamental and compelling interest." Id. at 774. As the courts have noted, "┌oσne of the principal 'mischiefs' at which the privacy amendment is directed is the 'improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party.'" Payton v. City of Santa Clara, 132 Cal. App. 3d 152, 154 (1982). Under this axiom, while release of the information might be permissible for a valid purpose, it is clear that the courts would not require disclosure for a purpose inconsistent with public policy.

Here, the Commissioner has not indicated the use to which he intends to put the names that have been requested. Without such information, we cannot determine whether such use is appropriate. For example, if the information were requested for purposes of conducting an investigation, release might be deemed appropriate. However, because the Commission has declined to conduct an investigation at this time, the Commissioner is acting as an individual and is therefore without the powers granted to the Commission pursuant to Charter section 128 to conduct an investigation. Should the Commission later decide an investigation is appropriate pursuant to the resident's request, it may, as a full Commission, request the information for investigatory purposes. It would then be appropriate for the Commission to receive the names.

Conversely, should the Commission choose to delegate the investigation to a third party, as it may do under the Charter,

provision of the names to the individuals conducting the investigation would be appropriate. Provision of the names to the Commission would not, however, in this instance be appropriate. The Commission would need the names only if a disciplined employee were to request a public hearing.

Public Records Act

Competing with the individual right to privacy is the public's equally fundamental and important right to have access to the workings of its governmental entities. The courts note that: "The Public Records Act (Gov. Code, Section 6260 et seq.) (right to inspect public records) was adopted for the explicit purpose of increasing freedom of information by giving the public access to information in possession of public agencies." Roberts v. City of Palmdale, 5 Cal. 4th 363, 364 (1993). "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Braun v. City of Taft, 154 Cal. App. 3d 332, 335 (1984).

Under the auspices of the Act, "[t]he mere custody of a writing by a public agency does not make it a public record, but if a record is kept by an officer because it is necessary or convenient to the discharge of his official duty, it is a public record." Braun, 154 Cal. App. 3d at 340. However, the Act at section 6254 provides for a number of specific exemptions from the otherwise sweeping language. Section 6254(c) exempts "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." Id. at 341.

The Braun case provides detailed analysis of the conflicts inherent in questions regarding the disclosure of employment records of public employees. In the Braun case, selected records of an employee were released to the public by an employee. The City argued the disclosure was prohibited by Government Code section 6254(c). It argued that the personnel file exemption indicated an all or nothing approach and that the Legislature intended, by use of the word "file," that the entire file be exempt.

The court, however, said it was unlikely that such an approach was intended by the Legislature. The court's conclusion is borne out by the Act itself, which provides for a balancing test to determine when a non-exempt disclosure may nevertheless be exempted if a need for nondisclosure is shown. Government Code Section 6255. The court stressed that "[t]he weighing process involves what public interest is served in this particular instance in not disclosing the information versus the public interest served in disclosing the information." (Emphasis in original.) Id. at 346.

We must, therefore, consider the conflicting interests affected as

a result of the Commissioner's request. It is clear from the Braun case that names of public employees are generally to be treated as public records except in very narrow instances. This case presents a narrow exemption because of the particular facts. As a result of the airing by Channel 10 of the film of City employees, department heads initiated fact-finding investigations into the actions of the employees. These investigations may lead to discipline. Public employees are entitled by law to receive "notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline." Skelly v. State Personnel Bd., 15 Cal. 3d 194, 215 (1975).

The results of the investigation then become a part of the personnel file and are exempt from disclosure under Government Code section 6254(c). Only if the disciplined employee pursues an appeal before the Commission do the records become public. There is clearly a strong public policy against disclosing the names of employees prior to concluding an investigation into alleged acts of impropriety. Chronicle Pub. Co. v. Superior Court, 54 Cal. 2d 548, 567 (1960). City of Los Angeles v. Superior Court, 33 Cal. App. 3d 778, 785 (1973). A public employee has a right to protect his or her name and reputation against charges which may be alleged, but not yet proven. It is, as previously noted, the right to be left alone. Since no countervailing public policy interest has been shown by the Commissioner's request, disclosure is inappropriate.

If you have any further questions, please call.

Respectfully submitted,
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APPROVED:
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